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No. 92-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITIZENS ELECTRIC CORPORATION,
Petitioner,

VS.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	5

TABLE OF AUTHORITIES

Page

Cases:

Bowen v. Massachusetts, 487 U.S. 879 (1988) 2,3,4

Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 2

Independent Petrochemical Corp. v. Aetna Casualty and Surety Co., 944 F.2d 940 (D.C. Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1777 (1992) 2

Ohio v. Department of Interior, 880 F.2d 432 (D.C. Cir. 1989) 2

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 3,4

Statutes:

Administrative Procedure Act, 5 U.S.C. §702 3

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") §107(a), 42 U.S.C. §9601 *et seq.* 1,2,3,4

Section 107(a) 2

Section 107(a)(4)(B) 2

Section 107(a)(4)(C) 2

Section 107(f)(1) 2

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Respondent contends that the question presented by the petition is whether the Eighth Circuit properly ruled that Missouri courts would, if ever presented with the issue, decide that Comprehensive General Insurance liability policies cover only "legal damages" as a matter of state contract law. Respondent mischaracterizes the petition, the statute and this Court's decisions.

The question presented by the petition is whether an action to recover response, removal, remedial and cleanup costs of a hazardous waste site under the Comprehensive Environmental

Response, Compensation, and Liability Act of 1980 ("CERCLA") §107(a), 42 U.S.C. §9607(a), is a "legal" or "equitable" claim. The nature of a cause of action created by a federal statute is indubitably a quintessential federal issue having nothing to do with state law. The fact that the Court's decision on *that* issue will have important implications for state law contractual questions, such as insurance coverage for environmental cleanup claims, does not convert the matter from one of federal law to state law.

Respondent cites *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) for the proposition that CERCLA response costs are not imposed as compensation for private parties who suffer economic harm resulting from discharges of hazardous substances. Resp. Br. in Opp. at 6-7. In fact, the Court said that "Superfund money [is not] available to compensate private parties for economic harms that result from discharges of hazardous substances," 475 U.S. at 359-360 — a far different point from the one urged by Respondent. Indeed, it is quite clear that CERCLA authorizes private parties to sue for response costs, thus compensating them for that particular type of loss suffered as a result of contamination of a hazardous waste site. *See* CERCLA §107(a)(4)(B), 42 U.S.C. §9607(a)(4)(B). The fact that response costs are compensatory is further buttressed by their inclusion by Congress as one of the elements of natural resource damages under CERCLA §107(a)(4)(C), 42 U.S.C. §9607(a)(4)(C), a kind of claim Respondent does not challenge as "legal." *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 944 F.2d 940, 947 (D.C. Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1777 (1992); *Ohio v. Department of Interior*, 880 F.2d 432, 450, 459 (D.C. Cir. 1989). *See also* CERCLA §107(f)(1), 42 U.S.C. §9607(f)(1) (no double recovery of response costs permitted in natural resource damage action).

Respondent also suggests that *Bowen v. Massachusetts*, 487 U.S. 879 (1988) is dispositive. *Bowen* involved a dispute

between a state and the federal government over a question of disallowing payment of certain grant monies under the Medicaid program. The Court decided that the case did not involve a claim for money damages and thus fell within the jurisdiction of the district court under the Administrative Procedure Act, 5 U.S.C. §702, and not within the jurisdiction of the Claims Court.

In its analysis, the majority opinion contrasted Congress' use of the words "money damages" in §702 with the federal government's contention that these words should be construed to mean "monetary relief," a broader term which included orders for the payment of money incidental to or as part of the equitable relief sought. The majority declined to adopt the latter interpretation, in part because of "the obvious difference in meaning between the two terms and the well-settled presumption that Congress understands the meaning of existing law when it legislates." 487 U.S. at 896. Thus, the majority construed the words "money damages" to have the time honored meaning of the term at common law. 487 U.S. at 897.

Yet, Respondent suggests that this Court's use of the identical phrase — "money damages" — twenty-one times in the course of the opinions in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) to describe a cause of action for the recovery of response costs constitutes "silence on the nature of CERCLA remedies." Resp. Br. in Opp. at 5. Surely, the authors of the *Union Gas* opinions did not use this term loosely or bruit about the words "money damages" oblivious to their meaning "as used in the common law for centuries." *Bowen*, 487 U.S. at 487. If this be silence, then it is one which speaks volumes.

The dissent in *Bowen* argued that it is the nature of the relief sought, not just the label attached to it, which determines whether the claim is legal or equitable. 487 U.S. at 915. It noted that it "does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages)" into, for

example, "a declaration that the sum must be paid." The relief sought in cost recovery cases is an amount equal to the costs of response, removal, remedial and cleanup costs paid by the plaintiff to dispose of the hazardous substances on the site. The plaintiff, whether governmental or private, has suffered a loss which is compensated by the payment of money. The complaint does *not* seek the return of specific property, specific monies (such as rare coins), the disgorgement of funds wrongfully collected from another, or any of the usual objects of equitable relief. The fact that the relief may be "restitutionary" is not decisive, since "restitution in the judicial context commonly consists of money damages." *Bowen*, 487 U.S. at 917 *n.* 2 (Scalia, J., dissenting).

Petitioner does not rely simply upon the use of talismanic words in the *Union Gas* opinions as the basis for its position. The compensatory nature of cost recovery actions, their similarity to the measure of damages in common law actions for damage to real property and the history of restitutionary remedies all strongly suggest that the cause of action created by CERCLA is "legal" rather than "equitable." Respondent concedes that the Court's clarification of this question would have an important effect on the state law contractual issues governing insurance coverage. Petitioner agrees that it will have that result — and that is why the issue is one of national importance which transcends the dispute between these two parties.

Petitioner neither asked nor "invited" the Court to decide the state law question of whether the Eighth Circuit correctly held that there is insurance coverage for "legal damages" but not "equitable damages" under Missouri law. Petitioner accepts the Eighth's Circuit's decision on that point for purposes of this petition. Rather, Petitioner seeks to have the Court decide a more fundamental question — and an unquestionably federal one: Are CERCLA cost recovery actions "legal" or "equitable"?

CONCLUSION

The petition for writ of certiorari should be granted.

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